UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHWEST METALS COMPANY, a corporation,	:	
Plaintiff in Error,	:	
vs.	:	No.4445
FRANCISCO GOMEZ,	:	
Defendant in Error.	:	

Upon Writ of Error to the United States District Court of the District of Arizona.

ADDITIONAL POINTS AND AUTHORITIES OF PLAINTIFF IN ERROR IN REPLY TO BRIEF OF DEFENDANT IN ERROR

ANDERSON, GALE & MILLER
Attorneys for Plaintiff in Error

Filed this ____ day of _____, 1925.

FRANK D. MONCKTON
Clerk

By _____
Deputy Clerk

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If it is the wish of the Court, and their pleasure, we would be pleased to have them consider the following points and authorities in reply to defendant's Brief, for the reason that Defendant in Error raised a number of new matters in their Reply.

than a druggist, who fills a prescription, or a masseuer, who carries out certain orders of the physician, or a waiter, who carries in the tray of food, acting under the orders of the physician. The mere fact that she is acting under the directions of the physician does not make her an assistant, or his agent, within the law.

Defendant in Error cites Wigmore on Evidence. We are very happy that they did so. This whole question is treated by Wigmore, Second Edition, Volume 5, Sec. 2380, 2381 and 2382. Reference to this was made in our original Brief, and we quote from Paragraph 2382, which does not in any way support Defendant in Error, but we think clearly the opposite:

> "The confidence which is protected is that only which is given to a professional physician during a consultation with a view to a curative

> treatment; for it is that relation only which the law desires to facilitate.
>
> (a) Hence, the person consulted must be a professional physician, in the usual sense of the word. This does not include a veterinary surgeon; nor a pharmacist; nor a nurse, or other skilled auxiliary practitioner. Nor does it include a dentist;"

A nurse is not skilled in medicine, as an assistant physician, or as an assistant surgeon. She carries out the orders of the doctor, as to treatment, as to the doing of certain things. There is no confidential relation between the patient and herself, in the sense that the law contemplates.

Counsel for defendant stresses the proposition that we overlooked paragraph 5551 of the Statutes of Arizona. We were very mindful of this section and made no such contention as stated by counsel, for

a strict construction of our statute, but to the contrary our statement was:

> "Our statute, being in derrogation of the Common Law, and while liberally construed, it cannot be extended beyond the plain terms of the statute".

We also were mindful of the following section of the Statute of Arizona, to-wit: Paragraph 5552, first section thereof, which provides that words: "which have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning". The words "physician and surgeon" certainly have a peculiar and appropriate meaning in the law, as used in our statute, and therefore must be understood and construed according to that peculiar and appropriate meaning, and such

meaning does not include the word "nurse", or "assistant", or "agent", or "dentist", or "druggist", or any other person, save and except a physician or surgeon.

We also call attention to Section 5555 of the Arizona Code.

II

Defendant in Error takes the position that testimony given on cross-examination by the plaintiff is not voluntary testimony. We think such a proposition is answered by a mere statement as follows: If such testimony is elicited by competent cross-examination, (that is to say, upon matters and things brought out in chief and within the rule as to cross-examination), then it is just as voluntary as if brought out in direct examination. We feel that no authority can be found in support

of any other position than this. To permit a witness to give his story and then not permit competent cross-examination of the matters and things brought out, for the reason that he would be giving involuntary testimony, appears to us as more than ridiculous.

III

Defendant claims that the Egich decision, 22 Arizona, 543, lays down a rule which is adverse to our position in this case. We take the position that the Egich case is a strong authority in favor of our position taken under Assignments No. I and II. While the Arizona Court did disagree with the Supreme Court of the United States, as to inherent risks and hazards, yet they laid down the rule, not only once, but several times, and emphasized

it, that the liability arose when the injury was caused by an accident due to a condition, or conditions, of the occupation, including all of these accidents, from whatever source, SO LONG AS THE ACCIDENT CAUSING SAID INJURY WAS DUE TO A CONDITION OF THE EMPLOYMENT. The accident must be due to the condition, the injury must be due to the accident. This certainly does not hold that an infection resulting from some other source than a condition of the employment can be recovered under our Employers' Liability Law. This authority supports the position that the employee must allege and prove that the injury was occasioned by the accident and that the accident was occasioned by a condition of the employment. In this connection we desire to call the Court's attention to 58 Federal, page 945 cited by defendant, upon this question, that the infection, not being a result

defendant is not liable.

We call the Court's particular attention to page 954 of this Opinion, cited by defendant, where the Court says:

> "We are of the opinion that in the legal sense, and within the meaning of the last clause, if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole, and proximate cause."

IV

Defendant cited 25 Arizona, 150, as being a case identical with the present one, upon the question of privileged communication. We call attention to the fact that in the Garcia case, 25 Ariz. 158, the

plaintiff's brother testified to certain things, which they did not permit the doctor to contradict. We place emphasis upon the words "plaintiff's brother", not the plaintiff who had testified, and who, in this case, we seek to contradict. We feel that the distinction is very clear.

V

In support of their position sustaining the lower Court in refusing to permit the hypothetical question to be asked, under our Assignments No. 9 and 10, they cite 58 Federal, 945. A simple reading of this opinion will show that it has no application to the question here involved. This is further borne out by the fact of the citation of this authority in the case of Motey vs. Pickle Marble & Granite Co. 74 Fed.155, upon

the question of opinion evidence.

The real rule is laid down in 11 Ruling Case Law, cited by us in our Opening Brief, but this case is very interesting for the quotation cited upon another phase of this case, and we thank Defendant in Error for calling our attention to it.

VI

We cannot refrain from calling attention to the fact that Defendant in Error believed that the Indiana Supreme Court decided the Hennyack vs. Prudential Insurance Company case, 87 N.E. 769, cited in our original Brief, while in fact it was the New York Court that decided the case, and the New York statute was in question, and we hope they are not as far afield in their ideas of the case as they were as to the source from whence it came.

VII

Defendant in Error labors to show that the credibility of a witness who has not been impeached, cannot be attacked. Certainly, no one contends to the contrary, but we wish to point out there is a great difference between the credibility of a witness and the interest, or lack of interest, and the bias or prejudice of a witness. In practically every jury trial instruction is given to the jury which covers this old familiar rule, to-wit: that the jury has a right to take into consideration the interest, or lack of interest, or the bias or prejudice, if any, shown by each and every witness, the witnesse's knowledge and means of knowledge, etc. This is a very familiar and ancient rule that you have a right to prove that

a witness has an interest, or a lack of interest, in the subject matter in controversy. This is entirely different from attacking the credibility of a witness. This lack of interest and this interest, we certainly had a right to show.

VIII

They pass by our objection to the testimony of the physician as to occupational blindness, with the statement that impairment of earning capacity may be shown under an allegation of permanent disability. There is no doubt of that but occupational blindness would be prejudicial testimony, as a jury might think that he was unable to do any work. Such occupational blindness is not contemplated under our statute. They have a right to show total disability. They have a right to show impairment

but they have no right, in the absence of law relative to industrial or occupational blindness, to bring in such testimony under our law. We feel sure that the Court will understand why this Assignment of Error was made, upon an examination of our statute and the pleadings in the case.

IX

In conclusion we want to call attention to the fact that our privilege statute, as to communications of physicians and surgeons, was taken from the State of Kansas, and under the familiar rule that we should be bound by the construction placed upon the statute by the Courts of the State from whence it was taken, we call attention to the case of

Kansas Ry. vs. Murray
40 Pac. 646

Armstrong vs. Topeka Ry.,
144 Pac. 847

Kansas, first, had a statute identical with ours as it now stands, and the privilege extended to any physical, or supposed physical disease, or any knowledge obtained by personal examination, etc. Later, the legislature of Kansas included the words "defects or injuries", after the word "disease", clearly showing that it was the intention of the legislature, in the first instance, to include disease, only, and not injury. If that construction is adhered to then physicians are not privileged as to any injuries and only as to disease, or supposed disease, but another interesting point would be observed in the construction of this statute by this Court in the Armstrong decision where they hold, [and we direct particular attention to page 850, 144 Pac. par. 3];

"This statute, in its terms, will not be extended by implication, or by interpretation, but will be strictly construed in favor of the CONSTANCY of the witnesses".

Respectfully submitted,

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